Office of the State Public Defender

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PUBLIC DEFENDER NEWS

CHIEF'S CORNER

Fifty years ago this month, the U.S. Supreme Court held that juveniles are entitled to due process protections. In its' decision in *Kent v. United States*, the Court emphasized that "[t]he right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."

Much of the work we do does not appear in newspaper headlines. We represent kids like Morris Kent, who get caught up in juvenile proceedings. We represent people who have problems with substance use and those who struggle with mental health issues. We represent veterans, moms and the elderly. Our clients are people in the community charged with non-violent offenses. Most of our clients are poor. They face the loss of their children, the loss of job opportunities and their driver's license, or the obligation to pay substantial fines, fees and surcharges.

The lawyers, investigators and staff of our public defender office work to protect the legal rights of thousands of Montanans each year. As Tony Benedetti, Chief Counsel for the Massachusetts public defender agency recently observed, public defenders fight "for the right of all of us to live in a society in which everyone is treated fairly regardless of our wealth, race or social standing, regardless of our age or mental status, and regardless of what bad acts we have been accused of committing. Fairness is the most fundamental value underlying a democratic society and a healthy public defender system is a critical component of a fair and effective court system."

Bill

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OPD MOURNS THE LOSS OF ONE OF ITS BEST

We lost a dear friend and colleague with Dave Stenerson's recent passing. Dave was a staunch advocate for the rights of the poor. He fought long and hard in defense of persons confronted by the vast resources of the state. He did so with a generous heart.

Dave served in the Navy during the Vietnam war and was awarded a Silver Star and Purple Heart for his service. He later worked as a journalist, and then went to law school, graduating from UM in 1989. He enjoyed riding his Harley, golfing, fishing, and Griz football. His was a life well-lived.

Dave's passing leaves a big hole in our ranks. Dave was a mentor and friend to all in the Missoula and Hamilton offices. His wife, Diane, was always at his side. Diane wanted to share the following with her OPD family. ~ *Bill Hooks*

I found this quote when going through some of Dave's things after his service. I'm not sure of its origin but it is so appropriate and fully represents what Dave Stenerson was all about:

> "A criminal lawyer is a person who loves other people more than he loves himself; who loves freedom more than the comfort of security; who is unafraid to fight for unpopular ideas and ideals; who is willing to stand next to the uneducated, the poor, the dirty, the suffering, and even the mean, greedy, and violent, and advocate for them not just in words, but in spirit; who is willing to stand up to the arrogant, mean-spirited, caring and uncaring with courage, strength and patience, and not be intimidated; who bleeds a little when someone else goes to jail; who dies a little when tolerance and freedom suffer; and most important, a person who never loses hope that love and forgiveness will win in the end."

Dave loved his job with OPD and truly enjoyed mentoring young attorneys to teach them what being a public defender is all about; he treasured seasoned attorneys and held them in high regard; he worked hard to help support staff receive the compensation they so sorely deserved; and he was looking forward to assisting investigators in that same way.

His work in this world was not done, and I charge each and every one in OPD to keep up the good fight and continue what Dave believed was God's work. We will all miss his red tie, cowboy hat and boots, and his belly laugh and booming voice that got louder with every Miller Lite. Rest in peace, Dave. I know you have our backs. ~ Diane

WELCOME!

Fritz Gillespie

Late last month Governor Bullock appointed Mark Parker, an attorney from Billings, to the Public Defender Commission. Mark was nominated by the Supreme Court to replace Ken Olson.

Mark was admitted to the Bar in 1980 and has been in private practice since. He is the immediate past president of the State Bar and has served in various capacities with the Bar Association for many years. Mark is no stranger to criminal defense and is no slouch at it. Just a few days ago there was a post on the MTACDL listserve about his 2001 success in getting Judge Cebull to grant his Rule 29 motion to dismiss the US's indictment when the government rested. In 2013 Mark won the Haswell Award for his spirited article defending the importance of the public defender system--Gideon Schmideon. As Bar President, Mark supported OPD and testified on our behalf during the 2015 session.

Mark has a good sense of humor and is witty, as anyone knows who listens to the Yellowstone Public Radio twice a year week-long fund drives. Everyone has a good laugh as we are making our pledges when Mark is on the air. Welcome Mark, as we are certain you will make a good contribution to the agency.

DEDICATED TO CARRYING ON THE FIGHT

Commissioner Larry Mansch was featured in a recent Missoulian article in his role as legal director of the Montana Innocence Project.

The Innocence Project works to exonerate prisoners they believe are not just wrongly convicted, but are actually innocent of the crimes for which they are incarcerated. They had several victories in 2015, but there is much work to be done. The Innocence Project plans to work on legislative changes in the upcoming session, including statewide requirements to preserve DNA evidence for a set period of time.

We appreciate all that Commission Mansch does for OPD as well as the greater community.

RESOURCE REMINDERS

OPD's Brief Bank is available to attorneys who work for OPD, either as state employees or as contractors with a current Memorandum of Understanding. Contact Peter Ohman for more information.

The State of Montana has a contract with CTS Language Link for interpreter services. OPD employees can access the information on OPD's intranet site.

Learn how to save a life with your bare hands with this Hands-Only CPR video.

THE APPROPRIATION PROCESS—HOW OPD IS FUNDED

Harry Freebourn

The State of Montana has three branches of government: the executive, legislative, and judicial. Only the legislative branch can approve appropriations for the State. Appropriations are sometimes referred to as the budget or checkbook or monies that agencies use to pay for resources that are necessary to fulfill their missions. Even though the legislative branch approves the appropriations, the executive branch produces the underlying budget requests for all three branches. These requests are submitted to the legislature for its consideration. One important factor when producing a budget is that by law the State must have a balanced budget. In other words, it can only spend what it takes in as revenue. Therefore, revenue estimates must be produced for the budget period before appropriations for the same time frame can be set.

Where does our agency fit in this process? The Office of the State Public Defender (OPD) is an executive branch agency and only one of many agencies that compete for funding from the state.

What is the appropriation process? In January of each odd numbered year, the legislature meets to enact law and approve appropriations for the three branches of government. As mentioned previously, the legislature uses the budget that it receives from the executive branch as its starting point for this process. The next legislature is scheduled to meet to do this work beginning in January 2017. However, before the legislature convenes there is a lot of work to be done to produce a State budget. The budget process is referred to as the Executive Planning Process or EPP.

Here are the steps that OPD must go through to get an approved appropriation.

1. The state uses base budgeting. This type of budgeting assumes that an agency receives what it spent in its base year and does not need to break out every dollar in detail for their next budget request. However, the 2015 legislature made OPD's funding one-time-only for the current biennium. This means that OPD will not have a base budget to work from, but instead, must develop its budget from the ground up. In other words, OPD's base budget is zero.

   OPD is building a budget for payroll and operating costs that currently exist. Our payroll budget is developed by determining the number of positions that exist as of a date in early July, 2016. This date is referred to as the "snapshot" because it is as if a picture is taken of all of those individuals employed by the agency as of that date. The current salary on the snapshot date for each position is the salary that is placed into our budget. Operating (non-payroll) costs cover expenditures like rent, travel, contractor payments, communication costs, etc. Some of these costs receive an increase for the rate of inflation or a decrease for deflation.

2. Expenditures for new items that do not exist today are requested in a change package. For example, if an agency believes that it needs more state hired attorneys to work increased caseloads, it could develop a change package that requests funding for costs related to these positions (such as base pay and benefits, office equipment, and supplies).

3. OPD's zero based budget and change packages are prepared by agency management. These items are presented to the Montana Public Defender Commission as they supervise and direct the agency and have the duty to approve its budget submission to the Governor. The Commission can approve or deny any part of the budget, add to the budget, or change the scope or dollar value of any budget item. Once the Commission approves a budget it is submitted to the Governor's Budget Office, referred to as the Office of Budget and Program Planning (OBPP).

4. OBPP reviews all budgets from all branches of government and all agencies, and they must by law produce a balanced budget. They usually undertake this balancing process between April and September. During this time frame agency representatives meet with OBPP to discuss budgets. OBPP can approve or deny any budget amount or any specific item or change the scope of any item or its estimated dollar value.

5. Once the budget is finalized by OBPP and approved by the Governor, it is packaged for

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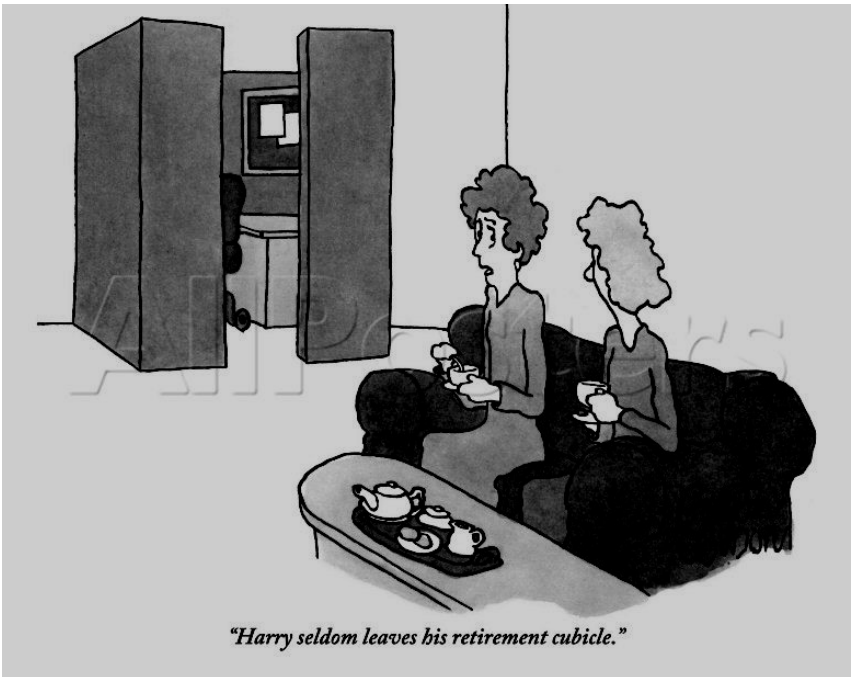
APPROPRIATION PROCESS (CONTINUED)

delivery to the legislative staff in early November, giving the staff time to analyze it and prepare comments before the legislature convenes in January.

6. When the legislature convenes their staff provides them with the Governor's recommended budget. So that it may review any budget request or request for appropriation, the legislature's leadership appoints committees. The Senate appoints members to the Senate Finance and Claims Committee and the House appoints members to the House Appropriations Committee. These two committees select members that will form joint appropriations subcommittees. The subcommittees each have responsibility for specific agencies, and they hear testimony from the agency and the public about programs, budgets, and change packages. The joint subcommittees approve, deny, or adjust budgets and recommend a budget for each agency to the Senate Finance and House Appropriations Committees.
7. Senate Finance and House Appropriations may conduct additional hearings on budgets. These committees can approve, deny, or adjust budgets.
8. The budgets then go to the full House and Senate for approval, disapproval or adjustment.
9. Finally the House and Senate form joint committees to work out differences in budgets and these joint committees can approve, disapprove, or adjust any budget.

Once the budgets are finalized they are distributed to each agency for use in the next biennium. The 2019 biennium consists of two fiscal years: FY 2018 (July 1, 2017 through June 30, 2018) and FY 2019 (July 1, 2018 through June 30, 2019).

Agency management and the Commission are working hard to obtain appropriate funding for our public defender system, but as you can see, there are many potential challenges along the way.



"Harry seldom leaves his retirement cubicle."

CHANGES AHEAD

As many of you know, Administrative Director Harry Freebourn will be leaving OPD this spring. Harry has been with the agency since inception, and has helped guide the agency through five (count 'em, five!) legislative sessions. (Harry worked for other organizations for three sessions before OPD was created, so he counts eight in total. No wonder he is worn out!)

The Public Defender Commission is taking the vacancy created by Harry's departure as an opportunity to reevaluate the agency structure. At a meeting on March 22, they adopted an organizational structure that includes a Chief Administrator to manage the agency and act as a single voice for OPD in the next legislative session.

The effect on the day to day field operations will be negligible. OPD is still an attached-to agency of the Department of Administration for administrative purposes. The PDC is appointed by the Governor and has the statutory responsibility to supervise and direct the public defender system. The PDC will be joined by the Chief Administrator to supervise and provide administrative services to the agency. However, the PDC will retain sole supervision and direction over the provision of legal services provided by the trial, appellate and conflict programs.

The Chief Public Defender, Chief Appellate Defender, and the Conflict Coordinator will continue to manage their programs as they do today. The Chief Administrator will manage all of the administrative functions and stakeholder relations, giving the program managers more time to focus on how best to provide client services.

The PDC expects to post a job announcement for the new position in the near future. The new structure will be a work in progress, and there may be some bumps along the way. Hopefully the end result will be a stronger agency that will not only survive Harry's departure, but will find new ways to thrive.

APPELLATE NEWS: A QUICK PRIMER ON MISDEMEANOR APPEALS

James Reavis

Before I became an assistant appellate defender, I was a brand-new, naïve, bushy-eyed assistant public defender in Butte. Two days into the new job I was besieged with dozens of cases that needed to be resolved immediately while simultaneously balancing the evidence of the case, the desires of my clients, and the personalities of the prosecutors. Law, it seemed, was but a dim gem amidst the morass of police reports, drunk tank videos, and hours upon hours of phone calls and emails.

This is the work we do, we warriors of the trenches, in the courts of limited jurisdiction—our city, justice, and municipal courts across the state. Most of the time it's plea deal in, plea deal out. But every once in a while, you stumble back into the office, wearing a befuddled gaze, and your co-workers gasp as they hear your tale of woe. Sometimes an appeal is the only way to right the ship.

Now as a practitioner before the Montana Supreme Court, over half of my workload consists of cases that originated from the courts of limited jurisdiction. Before an appeal can reach the Supreme Court, there must first be an "intermediate appeal" before the district court. The burden of this first appeal has, for better or for worse, been placed on our already overworked trial attorneys. My hope with this article is to provide you with an overview of the misdemeanor appeal process so that your appeal will be able to proceed smoothly.

The Very First Thing: Court of Record or Court of Non-Record?

The appeals process is radically different depending on whether or not your court is a court of record or a court of non-record. A "record court" is one where the court is actually recording every word that is spoken in the courtroom, usually by an electronic recording device, although transcription by a court reporter is also possible. All municipal courts are courts of record. MCA § 3-6-101(1). By default, justice courts and city courts are courts of non-record, *however,* local county or city commissioners may by resolution change the court into a "justice court of record" or "city court of record" respectively. MCA §§ 3-10-101(5), 3-11-101(2). There is no centralized database as to which courts are courts of record and which courts are not, so be sure to check with your local court.

Appealing from a Court of Record

Step One: *Make sure that the proceeding is actually being recorded.* I have yet to receive an appeal from a lower court of record that actually recorded the entire case. Appeals have been dropped because the sentencing hearings were not recorded. Initial appearances and omnibus hearings, despite their potential importance, are often left unrecorded as a matter of course. The recording may be turned off during critical parts of the trial, such as the voir dire, or when the verdict is being read.

As the appellant, it is your duty—not the State's—to ensure that the record is complete for appeal. Before any hearing starts, confirm with the judge that you are on the record. During a trial there will often be breaks and the judge will stop the recording. After every recess, double-check with the judge to make sure that you are back on the record.

Remember that the law is on your side. If you are in a court of record, you have a federal and state due process right to actually have those proceedings recorded. See *Britt v. North Carolina,* 404 U.S. 226, 92 S.Ct. 431 (1971); *Madera v. Risley,* 885 F.2d 646 (9th Cir. 1989); *State v. Deschon,* 2002 MT 16, 308 Mont. 175; 40 P.3d 391; *State v. Caswell*, 2013 MT 39, 369 Mont. 70, 295 P.3d 1063. In sum, these cases explain that while the appellant has a duty to preserve the record, a court's failure to record an important hearing is a violation of due process.

Sometimes, despite your best efforts, large portions of your trial or hearing will end up being unrecorded. If this happens, there are some actions you can take to help ameliorate the harm from an unrecorded proceeding. Any local rules notwithstanding, your lower court appeal is guided by the "Montana Uniform Municipal Court Rules of Appeal to District Court," which is found in Title 25, Chapter 30 of the Montana Code Annotated. (Confusingly, these "municipal" rules are the same rules used for justice courts of record and city courts of record too. See MCA §§ 3 -10-115(4), 3-11-110(4).) Under Rule 9, you can prepare a statement of the proposed evidence as you remember it. You can also enter into stipulations as to what the record should have said or request that certain portions of the record be modified or corrected. If, despite your best efforts, critical parts of your trial or proceeding were not recorded, you should raise it as an issue before the district court on your appeal.

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MISDEMEANOR APPEALS (CONTINUED)

Step Two: *Object, object, and object again*. If you do not make an objection in a court of record immediately after the legal error occurs, it is game over from an appeals perspective. Make your objections in the lower courts of record with the same level of seriousness as you would in district court; they are held to the same standards.

Appeals from courts of record are restricted to questions of law; you cannot re-litigate the facts. In your brief, be sure to provide citations to the portions of the record so the district judge can easily find the testimony that supports your case.

There is a reasonable debate on both sides as to how many issues one should argue in a brief. From my purely selfish perspective, I recommend in your appeal to the district court that you brief every single available legal issue. This is because if you do not raise the issue in your brief to the district court, we appellate defenders are procedurally barred from raising the issue before the Montana Supreme Court. *City of Missoula v. Asbury,* 265 Mont. 14, 19-20, 873 P.2d 936, 939 (1994).

There is a reasonable debate on both sides as to how many issues one should argue in a brief.

Appealing from a Court of Non-Record

Appeals from non-record courts are heard in the district court as a trial de novo, which means "trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered." *State v. Stedman,* 2001 MT 150, ¶ 9, 306 Mont. 65, 30 P.3d 353. By essentially being a "do-over," appeals from justice courts and city courts that are not courts of record are slightly easier affairs, but there are a number of things to watch out for.

#1: *Be sure to show up*. If the client fails to appear for any scheduled court date or if you miss any court deadlines, the district court has the authority to toss your appeal, which reinstates the judgment your client got in the lower court. MCA § 46-17-311(5).

#2: *If you enter into a plea agreement and plead guilty but reserve the right to appeal, you (almost always) must demand an evidentiary hearing in district court.* A plea of guilty in the court of limited jurisdiction waives the right to trial *de novo* in district court and will stop the case. MCA § 46-17-203(2)(a). There is one way to plead guilty in the lower courts and still bring the case up the appeal ladder, and that is by entering into a plea agreement that reserves the right to appeal under MCA § 46-12-204(3). If you do this, you must read *State v. Caldwell,* 1998 MT 261, ¶ 12, 291 Mont. 272, 968 P.2d 711, very carefully. Read it like three times. By pleading guilty and reserving an issue from a non-record court, you are kind of asking the district court for a trial *de novo*, but instead of a whole new trial, you are limiting the "trial" to the particular legal issue you preserved below, like a motion to suppress. The district court lacks appellate jurisdiction to try the entire case *de novo*, but it does have appellate jurisdiction to try the limited issues appealed *de novo*.

If you thought that last sentence was confusing, imagine what the district court is going to think. You have to take immediate action at the *first* appearance when your case shows up in district court. Explain to the judge that is used to normal trials *de novo* that this one is not normal; it is a preserved issue appeal from a non-record court. Explain that instead of setting omnis and pre-trial conferences and trial dates, the court needs to set briefing schedules and a time for an evidentiary hearing. Do not be coerced into the normal trial *de novo* pipeline, because that's when weird things start happening, like contradictory judgments, confused standards of review, and missed hearings.

You have to demand an evidentiary hearing. While the appeal is a limited trial *de novo*, it is still *de novo*, and the district court has no record of any hearings that may have gone on in the lower court. You must make a record all over again, since under *Stedman* a district court is not allowed to rely on any factual findings that were made by the justice or city court before. Do not rely on "facts" stated in motions; you need sworn testimony or the equivalent.

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MISDEMEANOR APPEALS (CONTINUED)

#3: *If you have a double jeopardy or a speedy trial claim, the district court acts as a court of review on those claims, thus it is best to raise them in the justice or city court first by written motion.* The Supreme Court has established two exceptions to a "trial *de novo*" from non-record courts, which are speedy trial and double jeopardy. The district court acts as a court of review for those particular legal errors because a trial *de novo* is not an "adequate remedy." *State ex rel. Wilson v. 13th Judicial Dist. Ct.*, 270 Mont. 449, 893 P.2d 318. Essentially, you need to first file a written motion to dismiss in the lower court and get an order ruling on your claim. Then, on appeal, you can argue that the lower court erred, instead of pretending that the lower court case never existed.

That being said, the obligation to create a record is still on you. For example, say in justice court you unsuccessfully argued that your constitutional right to a speedy trial was violated. On appeal, you would argue that the justice court erred, but you still need to hold an evidentiary hearing to receive testimony as to how the defendant was prejudiced, a critical prong of the speedy trial test. Make sure that everything supporting your case gets put into the district court record.

#4: *Remember that you have to do everything all over again.* A trial *de novo* is a fresh start. Re-file all of those pre-trial motions. Repeat all of those hearings. Go to trial a second time. Argue new issues, but don't forget to argue the old issues if you want to preserve them for appeal.

Keep up the good work, fellow trench warriors!

Operation Luna

Marsha Parr

I had been looking to get another dog, but had some pretty specific requirements: boxer, girl, puppy and deaf. Needless to say, it took a little while to find a puppy to fill the bill. And then one day there she was on a Craigslist ad, Luna. I soon realized by texting that the current owner was unreliable. After making several times to meet in Great Falls, she would cancel as I was driving to the meeting place. I finally had to realize that this was not going to happen.

After a week or so I couldn't get Luna out of my mind so I contacted the Havre OPD office to find out if they had a humane society. I figured that since Luna's current owner was getting rid of her because she was deaf and too dumb to be potty-trained, there was a good chance Luna would be dropped at the shelter.

Jamie Moore, our Havre office manager, told me the shelter was not a place for Luna. Jamie said give her a few minutes to see if she could put something together. Within the hour, Jamie had made arrangements for their attorney, Jesse Fries, to take Luna home and either Jamie or her husband would then meet me in Great Falls. In pure Jamie style . . . problem resolved.

Texts were sent and arrangements made. A HUGE thank you to Jamie and Jesse for helping me get Luna. I love my OPD Family!

Marsha

Nationwide 22 Veterans a day take their own lives. This event will memorialize them and help raise awareness about this epidemic. Montana has one of the highest suicide rates in the nation and roughly 26% of people who commit suicide in Montana are Veterans. This is why it is imperative to let Veterans, their family and their friends know there is support and they are not alone.

The Missoula Vet Center, Veterans Administration and local DPHHS will have resource booths set up at the event to promote the prevention of Veteran suicide. There will also be a memorial board for photos/stories of Veterans we have lost. VFW post 209 will host a BBQ for the event.

May 22, 2016

Missoula County Fairgrounds

(South Entrance, Between the Fairgrounds and YMCA)

HOST: X-Sports For Vets, Local Veterans and Concerned Citizens

COST: Free

The run consists of 4 -5.5K loops around the fairgrounds, Playfair Park and Albertsons. The 22 kilometers can be accomplished by running/walking/hiking as an individual or as a team. To memorialize the 22 veterans a day who are lost to suicide, many participants will carry a 22 Kilogram pack while hiking the 22k. The run will be hand timed and is not a US Track and field sponsored event. You can register for the event online, request a paper copy or donate at http://vetsuicideawareness.com.

Team of 4 – 5.5k per person – 1 loop

Team of 2 – 11k per person – 2 loops

Please register by May 1st to ensure we have a t-shirt in your size!